IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 4TH DECEMBER 2006 / 13TH AGRAHAYANA 1928

CRP.No. 695 of 2006()

I.A.2244/05 AND IA 2245/05 IN OS 246/01 OF
MUNSIFF COURT, THIRUVALLA

REVN. PETITIONER:

P. SANTHAKUMARI, SANTHALAYAM,
NALUKODY P.O., CHANGANASSERY TALUK,
KOTTAYAM DISTRICT.

BY ADV. SRI.S.SANTOSH KUMAR (PERUNAD)

RESPONDENTS: 1ST COUNTER PETITIONER/1ST DEFENDANT & PLAINTIFF:

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1. THE SECRETARY, K.S.E.B. VYDHUTHI BHAVAN,
PATTOM, THIRUVANANTHAPURAM.

2. OMANA AMMA, W/O. BHASKARA PILLAI,
MAKARACHAL VEEDU, KUTTOOR MURI,
KUTTOOR VILLAGE, THIRUVALLA TALUK.

BY ADV. SRI.N.SURESH

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04/12/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.2610/06 IN CRP 695/06

DISMISSED

4/12/2006

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

C.R.P .NO.695 OF 2006

Dated 4th December 2006

O R D E R

Petitioner is second defendant in O.S.246/01 on the file of Munsiff court, Thiruvalla. First respondent is the plaintiff. Suit was dismissed for default on 23/3/2005. I.A.Nos.2244/2005 and 2245/2005 were filed to condone the delay of 131 days in filing the application and application to restore the suit as provided under Order IX Rule 9 of Code of Civil procedure. It was contended by petitioner that original counsel relinquished vakalath and plaintiff entrusted the case to Adv.Santhosh Kurian who met with a motor accident and died and suit was dismissed for default and it was not known to plaintiff and on coming to know about dismissal, vakalath was given to the present counsel and application was filed to restore the suit and to condone the delay and failure of plaintiff to appear was not wilful and therefore suit is to be restored. Petitioner opposed application contending that

affidavit was filed by the counsel and not by the party and there is no sufficient reason to condone the delay and therefore application is to be dismissed. Under the impugned order dated 31/7/2006 learned Munsiff allowed the application on payment of cost of Rs.500/-. It is challenged in this revision petition filed under Section 115 of the Code of Civil Procedure.

2. Learned counsel appearing for petitioner was heard. Learned counsel relying on decision of Andhra Pradesh High court in Premier Chemical Industries v. Member Convenor (**2006 (3) KLT 923 A.P.H.C)** argued that application contemplated under Order XI Rule 9 of the Code is by the plaintiff and application should be supported by an affidavit and only the plaintiff can file an affidavit and affidavit filed by the counsel should not have been accepted by learned Munsiff and hence impugned order is to be set aside.

3. Order IX Rule 9 enables the plaintiff to file an application to restore the suit which was dismissed for default. If he could satisfy the court that there was sufficient cause for his non

appearance when the suit was posted to appear court has to restore the suit on terms or otherwise as it thinks fit. Arguments of learned counsel appearing for petitioner was that application contemplated is by the party and as provided under Civil Rule of Practice, petition shall be accompanied by an affidavit sworn by the plaintiff in person and not by counsel and counsel is not competent to file an affidavit on behalf of party as held in Premier Chemical Industries's case (supra) and therefore order is to be set aside.

4. On going through impugned order, it is clear that dismissal on 23/3/2005 was for the failure of plaintiff and counsel to appear when the suit was included in special list. Application to restore suit under Order IX Rule 9 was filed, after a delay of 131 days. Hence application was filed with a petition under Section 5 of Limitation Act to condone delay. True, no affidavit was filed by the plaintiff in person. Application was filed with an affidavit of the counsel. But the question is whether discretion exercised by the court below granting an opportunity to the parties to have a decision on merits is to be interfered in exercise

of revisional jurisdiction of this court under Section 151 of the Code on hyper technical reasons. Considering the fact that by the impugned order court has only granted opportunity to the parties to have a decision on merits and it was passed in the interest of justice. I do not find any reason to interfere with the order on technical reasons.

Revision petition is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.